Supreme Court, U.S.
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No. 97-412

In The
Supreme Court of the United States

October Term 1997

JOSEPH J. MATHY,
and
SARAH G. MATHY,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY TO BRIEF IN OPPOSITION

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Petitioners' Reply

Petitioners respectfully reply to the Respondent's Brief in Opposition to Petitioners Petition for Writ of Certiorari as follows:

1. The Supreme Court of Virginia did in fact decide a substantial question of federal law, contrary to the assertion of the Respondent.

Respondent's attempt to limit the decision of the Supreme Court of Virginia to a mere question of state tax law is not a fair reading of that Court's opinion. Even a casual reading of that opinion indicates quite clearly that the Supreme Court of Virginia had to decide the question of federal law which is the subject of Petitioners' Petition for Writ of Certiorari in order to decide the state tax credit entitlement.

While the federal question involved arose in the context of the entitlement of Petitioners to the out-of-state tax credit for Virginia income tax purposes, the Virginia General Assembly in Virginia Code Section 58.1-332A made that entitlement turn on whether the tax paid to the other state, here to the District of Columbia, was illegal or unauthorized under the enabling act of the taxing jurisdiction. The Supreme Court of Virginia itself characterized the issue before it as follows:

> "the Mathys are entitled to the credit under Code Section 58.1-332(A) unless the tax 'would be illegal and unauthorized under such other state's controlling or enabling legislation.' …

> Therefore, ... we must determine whether the UB tax [the D.C. tax in question] would be illegal and unauthorized under the District of Columbia's Home Rule Act." *Mathy v. Commonwealth of Virginia Department of Taxation*, 253 Va. 356 at 361.

The Supreme Court of Virginia then proceeded to determine that the District of Columbia unincorporated business income tax (Title VIII of the D.C. Income and Franchise Tax Act of 1947 as amended) is illegal and unauthorized by Section 602(a)(5) of the D.C. Home Rule Act as applied to the District sourced business income of a nonresident. *Mathy*, 253 Va. At 362.

The District of Columbia unincorporated business income tax and the Home Rule Act are federal laws enacted by Congress. The Virginia Supreme Court undertook to determine the legality of the D.C. tax in question under the D.C. Home Rule Act and did so, albeit incorrectly in Petitioners' view. Construing the D.C. unincorporated business tax as illegal under the D.C. Home Rule Act as applied to a nonresident is clearly a determination of a federal question.

Questions arising in a state court relating to the scope and construction of a federal statute are federal questions which may appropriately be reviewed by the United States Supreme Court on certiorari. *Moody v. McDaniel*, 190 F. Supp. 24 (D. Miss. 1960). The fact that the federal question arises in a state law context does not mean the question is any less a federal question.

The issue involved is a substantial one. According to the Virginia Department of Taxation, the amount of Virginia tax revenues involved in this issue exceeds $4

million per year if the D.C. tax in question is legal as applied to Virginians under the D.C. enabling legislation. See 1991 Legislative Impact Statements with respect to Virginia House Bill 1734 and Virginia Senate Bill 765, which bills in 1991 enacted the second paragraph of Virginia Code Section 58.1-332A, the Virginia tax provision in issue. If the Virginia Supreme Court's determination that the D.C. tax in question is illegal as applied to nonresidents of the District is allowed to stand, a veritable stampede of litigation against the District of Columbia can be expected, not just from Virginians but from any and all nonresidents of the District who have paid the D.C. tax in question on their D.C. sourced business income.

2. The federal question involved, i.e. whether the D.C. tax in question is illegal or unauthorized under the D.C. Home Rule Act, was raised by Respondent and was argued by both parties at every stage of the litigation.

Respondent argued that the D.C. tax in question was illegal under Section 602(a)(5) of the Home Rule Act. Petitioners argued that the tax was legal and was not barred by Section 602(a)(5). In addition, Petitioners argued that the income being taxed by the D.C. tax in question was not the kind of income protected by Section 602(a)(5).

Petitioners fully expected the Virginia Supreme Court to read Section 602(a)(5) of the Home Rule Act which by its terms bars only the new D.C. Council from enacting a commuter tax, not the U.S. Congress. When it became apparent from the opinion of Justice Keenan that the Virginia Supreme Court justices had not focused on what Section 602(a)(5) plainly says, Petitioners brought the perfectly obvious fact to the Court's attention in its timely Petition for Rehearing. Contrary to the Respondent's assertion, the

Supreme Court of Virginia did consider Petitioner's Petition for Rehearing and the Amicus Curiae brief filed and admitted to the record which clearly made this point, but the Court chose to deny Petitioner's Petition for Rehearing. That does not mean the Court did not consider the argument. In fact Petitioners' Petition for Writ of Certiorari is based not only on the adverse opinion of the Supreme Court of Virginia on the federal question at issue, but also on that Court's denial of Petitioners' Petition for Rehearing, a reliance specifically sanctioned by the Rules of the United States Supreme Court. Rule 13(3)of the Rules of the Supreme Court of the United States.

The question whether the D.C. tax in question is illegal as applied to a nonresident under Section 602(a)(5) of the D.C. Home Rule Act is a question of federal law. It was timely raised and considered by the Supreme Court of Virginia. Petitioners arguments were timely raised and considered by the Supreme Court of Virginia.

3. Respondent's assertion in its footnote 4 on page 5 of its Brief in Opposition that the Court in the *Bishop* case "addressed the legislative activity of the D.C. Council in enacting the DCUBT" is an incorrect characterization of the *Bishop* case. The *Bishop* court does not state that the D.C. Council enacted the DCUBT.

The *Bishop* court itself noted that the tax in question was enacted by Congress. The court then noted that Section 605 of the Revenue Act of 1975 adopted by the new D.C. Council repealed the professional exemption (which had been in the law since it was originally enacted by Congress in 1947) and thereby subjected professionals to the tax in question on their D.C. sourced professional income The Court then determined that the repeal was illegal and

unauthorized by Section 602(a)(5) of the Home Rule Act which prohibits the D.C. Council from imposing a tax on the personal income of a nonresident. What was objectionable was the D.C. Council's attempt to cause imposition of the tax on the personally earned income of individuals theretofore exempted from the tax. The ***Bishop*** court thus found that D.C. Council's repealing the exemption was an attempt to cause imposition of the tax on the professional income of nonresidents. The attempted repeal had the effect of subjecting previously exempted nonresidents' personal incomes to the tax. The Court did not say that the D.C. Council imposed the tax in the first place. Congress did that and continues to do so. Attempting to repeal the exemptions was the D.C. Council's backdoor way of attempting to impose the tax on the professional income of previously exempted nonresidents.

The tax on nonresidents, such as Mr. Mathy, on their District sourced rental business income which has never been exempted is entirely imposed by Congress. The new D.C. Council has literally done nothing to impose the tax on those nonresidents who were already subject to the tax long before the Home Rule Act became law.

4. The District of Columbia tax in question is obviously made by Congress in pursuance of the Constitution, contrary to Respondent's assertion.

Respondent says the Supremacy Clause only applies to laws made in pursuance of the Constitution and the D.C. tax in question is not such a law. The D.C. tax in question is clearly made pursuant to Article I, Section 8 of the U.S. Constitution which gives Congress plenary power to legislate for the District of Columbia. To the extent the Virginia Supreme Court has failed to give effect to the D.C. tax in question, a federal law enacted by Congress, the Virginia

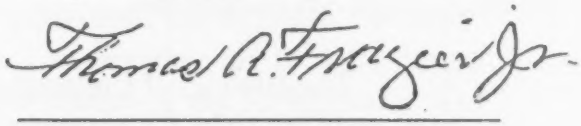
Supreme Court has failed to recognize the Supremacy of the federal law.

Conclusion

Petitioners respectfully reaffirm each of their positions in their Petition. The most important federal question is whether the Supreme Court of Virginia erred in determining that the D.C. tax in question is illegal and unauthorized by Section 602(a)(5) of the D.C. Home Rule Act. The fact that the question arose in a state law context does not make it any less a federal question. As the Supreme Court of Virginia stated: "We must determine whether the UB tax would be illegal and unauthorized under the District of Columbia's Home Rule Act." That is a federal question. The Supreme Court of Virginia decided that question, albeit erroneously, and to correct that error is the essence of Petitioners' Petition.

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Respectfully submitted,



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